



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-90-12*

FACTS:

You are the General Counsel to the State Department of Environmental Protection (DEP). Together with the Boston Bar Association, DEP has developed a proposal which would authorize the training and use of volunteer private sector environmental lawyers to assist DEP in reducing its backlog of adjudicatory hearing cases. Under the initial phase of the pilot project, DEP will assign volunteer lawyers to serve as mediators to facilitate either the settling of cases or the framing and narrowing of those issues which will subsequently be adjudicated. If the program is successful, DEP may seek expansion of the volunteer attorney program to include law clerk or special master services for DEP.

On behalf of both DEP and attorneys who are interested in the volunteer program, you seek formal guidance as to the application of G.L. c. 268A to volunteer attorneys.

QUESTION:

Does G.L. c. 268A allow private attorneys to serve as a volunteer capacity for the DEP pursuant to the proposed DEP/BBA pilot program?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

1. Jurisdiction

An attorney who performs mediation services for DEP is considered a "state employee" under G.L. c. 268A, s.1(q) during the period in which those services are performed. This jurisdictional status under G.L. c. 268A applies to uncompensated, as well as to compensated service to any state agency. Id.

An attorney who performs services to DEP on a voluntary basis is also considered a "special state employee" under G.L. c. 268A, s.1(o). A special state employee is exempt from many of the restrictions which G.L. c. 268A imposes on the private outside activities of full-time state employees.

2. Limitations on outside activities of volunteer attorneys

Section 4 of G.L. c. 268A limits certain outside activities of special state employees to DEP, depending on the employees' time commitment to DEP.

(a) Volunteers who serve for 60 days or less in any 365 day period

Under G.L. c. 268A, s.4, a special state employee who serves DEP for 60 days or less in any 365 day period is prohibited from acting as attorney for or receiving compensation from any non-state party in connection with any administrative proceeding, controversy or other particular matter¹ in which the employee participates,² or has official responsibility for as a special state employee. For example, if a volunteer attorney is assigned by DEP to mediate a permit dispute, the attorney is prohibited by s.4 from representing a private client in connection with the same dispute. On the other hand s.4 does not prohibit the attorney from representing clients in connection with other matters pending in DEP.

(b) Volunteers who serve for more than 60 days in any 365 day period

Under G.L. c. 268A, s.4, a special state employee to DEP who serves in that capacity for more than 60 days in any 365-day period is prohibited from privately representing a client in connection with any matter pending within DEP, irrespective of whether the employee has participated in or had responsibility for the matter as a volunteer lawyer. Under established Ethics Commission and Attorney General precedent, an attorney who serves DEP on any part of a day is considered to have served for a "day" in calculating the 60-day period under s.4. EC-COI-80-31. Conversely, a day is not counted for the purposes of the 60-day limit unless services are actually performed, EC-COI-85-49. Because the application of s.4 turns on the calculation of the 60-day period, volunteer attorneys must keep accurate records of their daily services for DEP.

3. Limitations on official activities of volunteer attorneys

Volunteer attorneys are also subject to certain limitations on their official DEP activities. Under G.L. c. 268A s.6, a volunteer attorney must abstain from participating for DEP in any matter in which the attorney's law firm has a financial interest. The abstention requirements will apply to participation in any matter in which the attorney's firm appears. EC-COI-89-5. To avoid any potential s.6 difficulties, DEP should ascertain, prior to assignment, whether the pending matter is one which would have a financial effect on the volunteer attorney's firm. Following receipt of information disclosing a financial interest under s.6(3), the DEP official responsible for hiring volunteer attorneys may exercise several options, one of which would be to grant written permission to the attorney to participate following a written determination under the standards of s.6(3). Further, should a volunteer attorney be assigned a matter which, by virtue of the attorney's prior relationship with the parties, creates an appearance that the attorney will unduly favor one side, the attorney should disclose this relationship to DEP. G.L. c. 268A, s.23(b)(3). Volunteer attorneys must also observe the safeguards of G.L. c. 268A, s.23(c) and refrain from disclosing any confidential information which they have acquired as DEP volunteers.

4. Limitations on partners of volunteer attorneys

The partners of a volunteer attorney are also subject to certain limitations on their private practice. Under G.L. c. 268A, s.5(d), a partner of a state employee is prohibited from representing a private client in connection with the same particular matter in which the volunteer attorney participates in or has official responsibility for as a DEP volunteer attorney. For example, if a volunteer attorney is assigned to mediate a permit dispute, the partners of the attorney may not represent private clients in connection with the same dispute. Aside from those matters in which a volunteer attorney participates or has official responsibility for at DEP, a partner may represent clients in other matters before DEP.

5. Post-employment restrictions on volunteer attorneys

Upon the completion of services for DEP, a volunteer attorney will be considered a former state employee and will be subject to three restrictions under G.L. c. 268A.

G.L. c. 268A, s.5(a) and (c), permanently prohibit a former volunteer attorney, and for one year the attorney's partners, from representing private clients in connection with the same matters in which the attorney previously participated as a DEP volunteer attorney. For example, if a volunteer attorney mediated without success a permit dispute for DEP, the attorney is permanently prohibited from representing a private client in connection with the appeal of the DEP adjudicatory decision in that same dispute. The attorney's partners will share this restriction for a one year period following the completion of services for DEP by a volunteer attorney.

G.L. c. 268A, s.5(e) establishes a one-year bar on a former volunteer attorney acting as a legislative agent^[3] on behalf of a private client before DEP. The restriction on acting as legislative agent includes activities to persuade DEP officials to take specific legislative action through either direct communication to those officials or by the solicitation of others to engage in such efforts. In the Matter of

Cornelius Foley, 1984 SEC 1982. In addition, the G.L. c. 268A, s.23(c) prohibition on disclosing confidential information continues to apply to former DEP volunteers.⁴

6. Additional Limitations

Aside from the substantive restrictions of G.L. c. 268A discussed above, DEP is authorized by G.L. c. 268A s.23(e) to establish additional standards of conduct on volunteer attorneys. These standards, which would be enforced by DEP, rather than the Commission, could address these potential conflict issues which DEP and the BBA believe G.L. c. 268A does not sufficiently address.⁵

* Pursuant to G.L. c. 268B, s.3(g), the requesting person has consented to the publication of this opinion with identifying information.

¹ "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. (G.L. c. 268A, s.1(k)).

² "Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. (G.L. c. 268A, s.1(j)).

³ "Legislative agent" means any person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof or to influence the decision of any member of the executive branch where such decision concerns legislation or the adoption, defeat, or postponement of a standard, rate, rule of regulation pursuant thereto. The term shall include persons who, as any part of their regular and usual employment and not simply incidental thereof, attempt to promote, oppose or influence legislation or the governor's approval or veto thereof, whether or not any compensation in addition to the salary for such employment is received for such services. G.L. c. 268B, s.1(k).

⁴ A potential supplementary restriction concerning matters under the volunteer's official responsibility, contained in s.5(b), is not relevant because any matter within the volunteer's official responsibility would also be a matter in which the volunteer participated for s.5(a) purposes.

⁵ For example, limitations addressing the contemporaneous private appearance in a wetlands case by a mediator assigned to a wetlands case could be the subject of an additional standard of conduct under s.23(e). EC-COI-85-12.